

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP802

Cir. Ct. No. 2015SC897

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

AMERICAN EXPRESS CENTURION BANK,

PLAINTIFF-APPELLANT,

V.

TIM HAGEN-FOLEY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Manitowoc County:
GARY L. BENDIX, Judge. *Affirmed.*

¶1 NEUBAUER, C.J.¹ American Express Centurion Bank (AMEX) appeals from an order denying its motion to vacate a judgment entered upon its

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

default in failing to appear at a scheduled trial. AMEX contends that it demonstrated “good cause” to warrant reopening the default judgment. We disagree and affirm.

¶2 AMEX commenced this action to collect on an alleged delinquent credit card account belonging to Tim Hagen-Foley. On October 13, 2015, Hagen-Foley was granted until October 27, 2015, to file an answer, and the matter was set for a trial on December 15, 2015. On October 26, 2015, Hagen-Foley, pro se, filed an answer with counterclaims, alleging violations of the Fair Debt Collection Practices Act (FDCPA), the Wisconsin Consumer Act, his privacy rights, and a lack of “good faith” constituting “deceptive practices.” Hagen-Foley alleged \$10,000 in damages, consisting of ten violations of the FDCPA at \$1000 per occurrence.

¶3 On December 15, 2015, counsel for AMEX failed to appear in court. The circuit court then dismissed AMEX’s complaint with prejudice and awarded Hagen-Foley \$10,000 on his counterclaims.²

¶4 On January 14, 2016, AMEX moved to reopen the judgment entered upon its default based on “good cause” pursuant to WIS. STAT. § 799.29(1)(a). In a supporting affidavit from Michael L. Starzec, a partner at Blitt & Gaines, P.C., the firm representing AMEX, he said that on November 25, 2015, its primary counsel for the state of Wisconsin, Jesse Ammerman, had left the firm, and “[d]ue to an intervening scheduling error on the part of ... clerical staff,” AMEX had failed to appear in court on December 15, 2015. As of December 29, 2015, Blitt

² On December 24, 2015, apparently unaware of the court’s actions, AMEX moved to dismiss Hagen-Foley’s counterclaims or, in the alternative, for a more definite statement.

& Gaines had appointed new counsel, Greg Ryan, for its Wisconsin office. Based on Starzec's affidavit, AMEX argued that there was "good cause" to vacate the default judgment. Further, AMEX had a meritorious defense to Hagen-Foley's counterclaims in that they either failed to state a claim or were so vague and ambiguous that AMEX could not reasonably be expected to frame a response.

¶5 The circuit court denied AMEX's motion. The court ruled that AMEX had not shown "excusable neglect" for its failure to appear at the trial on Hagen-Foley's counterclaims. It further stated AMEX had received adequate notice of the trial. "[I]neffective or sloppy calendaring on the part of counsel" did not constitute "excusable neglect," the court said. On that point, "[t]he case law is clear." The court added that if AMEX's counsel was going to practice on a statewide basis and did not have local counsel to handle a file, that was AMEX counsel's choice, but it ran the risk of not being prepared and in court. Thus, the court refused to vacate the judgment on Hagen-Foley's counterclaims. However, dismissing AMEX's complaint with prejudice was "extremely harsh and inequitable," and the court modified the dismissal of the complaint to without prejudice.³

¶6 AMEX appeals.

¶7 AMEX first contends that the circuit court erred in entering a default judgment on Hagen-Foley's counterclaims because he failed to provide "due proof of facts" to show that he was entitled to judgment.

³ This portion of the order is not at issue on appeal.

¶8 Where, as here, a defendant asserts counterclaims against a plaintiff, and the plaintiff fails to appear, “the court may enter a judgment upon due proof of facts which show the [counterclaiming defendant] entitled thereto.” WIS. STAT. § 799.22(2). When that occurs, a defaulting party’s sole recourse is to move to reopen the default judgment because no appeal lies from a default judgment. WIS. STAT. § 799.29(1)(a) (“There shall be no appeal from default judgments.”).

¶9 Next, AMEX contends that the circuit court erroneously exercised its discretion in denying its motion to reopen the default judgment because it applied the wrong legal standard, that is, it applied the “excusable neglect” standard of WIS. STAT. § 806.07(1)(a) rather than the “good cause” standard of WIS. STAT. § 799.29(1)(a).

¶10 It is true, as AMEX argues, that WIS. STAT. § 806.07(1)(a) refers to “excusable neglect” while WIS. STAT. § 799.29(1)(a), which is the exclusive procedure for reopening a default judgment in a small claims action, *see King v. Moore*, 95 Wis. 2d 686, 690, 291 N.W.2d 304 (Ct. App. 1980), refers to “good cause.”⁴ In this instance, the actions of an attorney who is negligent, dilatory, or who procrastinates does not amount to “good cause.” As to delays caused by attorneys, our supreme court has equated “good cause” with “excusable neglect,” a satisfactory explanation, or a justifiable reason for the failure to act. *Kisten v. Kisten*, 229 Wis. 479, 485, 282 N.W. 629 (1938). Although the decision in *Kisten* predated the enactment of the small claims act, *see State v. Hervey*, 113 Wis. 2d

⁴ To the extent Hagen-Foley argues that the “good cause” standard of WIS. STAT. § 799.29(1)(a) does not apply because AMEX “cannot now fashion itself as a defendant,” Hagen-Foley’s contention is without merit. With the assertion of Hagen-Foley’s counterclaims, he became a counterclaiming defendant, making AMEX a defendant with respect to those counterclaims.

634, 639-40, 335 N.W.2d 607 (1983), we presume that the legislature enacted the procedure for reopening a default judgment in a small claims action with knowledge of the existing case law, and particularly, what does or does not constitute “good cause.” *State v. Hansen*, 2001 WI 53, ¶19, 243 Wis. 2d 328, 627 N.W.2d 195; *Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, ¶22, 236 Wis. 2d 316, 613 N.W.2d 120. Therefore, the circuit court applied the correct legal standard in determining AMEX’s motion to reopen the default judgment.

¶11 Further, in applying that standard, the circuit court did not erroneously exercise its discretion. “Excusable neglect” or “good cause” in the context of a default is that “neglect which might have been the act of a reasonably prudent person under the same circumstances.” *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982) (citation omitted). “It is not synonymous with neglect, carelessness or inattentiveness.” *Id.* (citation omitted). A calendaring error due to AMEX’s regular counsel in Wisconsin leaving his firm does not amount to neglect which might have been the act of a reasonably prudent person under the same circumstances. *Mohns, Inc. v. TCF Nat’l Bank*, 2006 WI App 65, ¶12, 292 Wis. 2d 243, 714 N.W.2d 245 (holding that defendant’s claim that it did not answer the complaint because it and the summons were lost in transit when it changed offices did not amount to “excusable neglect”). Therefore, in applying the correct legal standard to the facts of record, the court reached a rational conclusion. See *Burkes v. Hales*, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). We, thus, will not disturb the circuit court’s proper exercise of its discretion.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.

